No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. a. Respondents err in asserting that "the Ninth Circuit did not address the question now pressed by [the Secretary of Agriculture]." Br. in Opp. 6-7. Our petition for a writ of certiorari presents the question whether it violates the First Amendment for the Secretary, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities. Pet. I. The Ninth Circuit unequivocally passed on that question, stating: "[W]e hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers." Pet. App. 21a.

b. Respondents also err in asserting that, with regard to the question presented, the Secretary "argued below the opposite of what [he] argues in [his] petition." Br. in Opp. 6.

Our petition advances two arguments on the merits. We argue that the generic advertising programs should be upheld under principles applied in the decisions of this Court involving the compelled funding of unions and integrated bars, such as *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). Pet. 15-19. We also argue that the programs comport with the First Amendment under the test for restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. 20-21.

We similarly relied on both the *Abood/Keller* and the *Central Hudson* lines of cases in the district court. There, we argued that "the supposed infringements on First Amendment freedoms" resulting from the generic advertising programs "are exceedingly minimal" when "[c]ompared to the significant burdens on constitutional rights authorized under *Abood*."[1] We cited *Keller* in support of that argument, and explained that *Abood* and *Keller* involved political speech, whereas the present case involves commercial speech.[2] We also argued that the

[1] Memorandum of Points and Authorities in Support of Defs.' Mot. for Summ. J. at 58 (filed Nov. 21, 1991) [hereinafter Gov't Summ. J. Mot.].

[2] Memorandum of Points and Authorities in Opp. to Pls.' Mot. for Summ. J. and in Support of Defs.' Mot. for Summ. J. at 12 (filed Jan. 31, 1992). In response to our *Abood* argument, respondents argued that *Abood* "stands for the proposition that the government cannot force anyone to associate with, or contribute to, the advancement of ideas which [*sic*] they disagree." Pls.' Opp. to Defs.' Mot. for Summ. J. at 47 (filed Feb. 3, 1992). In reply, we stated that "the 'compelled association' line of cases that begins with *Abood* * * * has no applicability to a government-mandated, *commercial* advertising program." Reply to Pls.' Opp. to Defs.' Mot. for Summ. J. at 15 (filed Feb. 14, 1992) (emphasis added). Contrary to respondents' assertion (Br. in Opp. 7), that statement was not intended, and cannot in context reasonably be read, as a reversal of our earlier position that *Abood* supports the validity of the generic advertising programs. Instead, the statement was intended merely to reiterate our view that the *Abood* line of cases involved political, rather than commercial, speech and for that reason the analysis utilized in those cases does not squarely govern the validity of the programs (which accords with the view expressed in our petition at pages 18 and 24-25).

programs satisfy the First Amendment under the *Central Hudson* line of cases.[3]

After the district court granted summary judgment for the government on the First Amendment issue, and while the case was pending on appeal, the Ninth Circuit held in *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429, 437 (1993), that the *Central Hudson* test was applicable to the generic advertising program administered under the AMAA marketing order for California almonds. In light of that holding, our brief for the Ninth Circuit panel in this case focused on our *Central Hudson* argument. See Gov't C.A. Br. 21-30. Contrary to respondents' contention (Br. in Opp. 5-6), however, we did not concede that *Central Hudson* furnished the appropriate test. In our petition for rehearing and suggestion for rehearing en banc, we urged the full Ninth Circuit to reconsider the applicability of the *Central Hudson* test to generic advertising programs authorized by the AMAA. See Gov't C.A. Pet. for Reh'g at 7-9.

In these circumstances, the arguments in our petition are properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992); see also *Virginia*

[3] Gov't Summ. J. Mot. at 56-57.

Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).

2. Respondents' submission confirms that their First Amendment challenge is founded upon the requirement that they fund the commercial speech conducted under the generic advertising programs. See, *e.g.*, Br. in Opp. 12, 14, 28. As we explain in our petition, the most analogous cases involve First Amendment challenges to union-shop agreements and integrated bars, such as *Abood* and *Keller*. Pet. 16-17. In opposing a standard of review based on *Abood* and *Keller*, respondents contend that, "when [the Secretary] compels commercial speech the scrutiny required is the commercial speech test" of *Central Hudson*. Br. in Opp. 10. That contention merely joins the issue of whether the *Central Hudson* test for government restrictions on commercial speech also applies when the government compels the funding of commercial speech. This case thus calls upon the Court to address that important and unsettled question.[4]

Respondents argue that this Court's decisions involving "fully protected speech" indicate that governmentally compelled funding of commercial speech should be reviewed under the same test that applies to governmental restrictions on commercial speech. Br. in Opp. 10. One of the cases cited by respondents (*id.* at 11), however, contradicts that very contention. The Court in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), stated that, "[a]lthough the state may at

[4] Respondents err in suggesting that the Court previously addressed the question of "compelled commercial speech" (Br. in Opp. 10 n.11) in *Board of Trustees* v. *Fox*, 492 U.S. 469 (1989). The issue in *Fox* was "whether governmental *restrictions* upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end." *Id.* at 471 (emphasis added).

times 'prescribe what shall be orthodox in commercial advertising' * * *, *outside that context* it may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 2347 (emphasis added) (quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985)). *Hurley* thus reaffirms that principles applicable to fully protected speech have only limited application to commercial speech.

Respondents also err in relying (Br. in Opp. 11) on *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which *upheld* against a First Amendment challenge the generic promotion program for beef that is established by federal law and funded by mandatory industry assessments. See Pet. 21-23. The Third Circuit in *Frame* did not review the beef program under the *Central Hudson* test. On the contrary, the court expressly applied a "higher standard of scrutiny" than applied in *Central Hudson*. *Frame*, 885 F.2d at 1134. As we explain in our petition, the Third Circuit erred in that respect. Pet. 24-25. In any event, the decision does not support respondents' contention that the programs at issue here should be reviewed under the *Central Hudson* test.

Respondents also argue that, because the generic advertising programs are funded by mandatory assessments, they restrict respondents' commercial speech by reducing the amount of money respondents have to buy advertising. Br. in Opp. 12-14. As we explain in our petition, that argument proves too much. Pet. 16 n.9. Any regulatory provision that imposes costs on a regulated entity reduces the amount of money that the entity has to spend on advertising (or for any other purpose). That does not mean that any such provision constitutes a restriction on commercial speech that must satisfy the *Central Hudson* test.

3. Our petition explains that the generic advertising programs comport with the First Amendment whether they are reviewed under the principles of *Abood* and *Keller* or under the *Central Hudson* test. Pet. 18-21. The programs satisfy the First Amendment, in brief, because they serve a compelling governmental interest by promoting steady and increasing demand for farm commodities, thereby complementing other AMAA provisions that promote a steady supply of farm commodities of uniform quality; they are reasonably funded by mandatory assessments on members of the industry, who benefit from the "orderly marketing conditions" (7 U.S.C. 602(1)) established by the marketing orders, and many of whom would otherwise be "free riders"; and they do not unduly infringe on the First Amendment rights of handlers, since they merely promote products that the handlers themselves have voluntarily chosen to market, while leaving the handlers free to promote their own brands of the product.

Respondents contend that the programs violate the First Amendment primarily because they purportedly favor respondents' competitors, especially those who serve on the committees that administer the programs. Br. in Opp. 14-17, 20-21, 24-25. In support of that contention, they assert that "[t]he Ninth Circuit found * * * that respondents were being forced to support an advertising program that promotes the 'Red Jim' nectarine—a proprietary variety of one * * * committee member[]." *Id.* at 24. Respondents provide no citation to support that assertion, and the Ninth Circuit made no such finding.[5] Nor did the Ninth Circuit credit the other claims of bias in the operation of the programs that respondents renew

[5] The Ninth Circuit referred to the "Red Jim" variety only once, in paraphrasing the same claim regarding that variety that respondents make here. See Pet. App. 15a n.6.

here. See *id.* at 15-17, 21, 24 n.20. To the contrary, the Ninth Circuit found "no evidence of such insider control of the committees." Pet. App. 18a n.8. The district court likewise rejected respondents' "vague claims" of bias in the programs. *Id.* at 91a.

Respondents also argue that the government failed to prove that the programs are sufficiently effective to justify their asserted infringement on First Amendment rights. Br. in Opp. 17-18. Respondents base that argument (*id.* at 17) on the Ninth Circuit's holding that, under *Central Hudson*, the government had to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising." Pet. App. 20a. As we explain in our petition, that holding is not only wrong; it also requires proof that will be nearly impossible to mount for any generic advertising program because of the speculative nature of the proof. Pet. 20-21. The Ninth Circuit's reasoning thus would apparently invalidate the operation in that circuit of many of the numerous statutorily created generic promotion programs funded by mandatory assessments.[6]

[6] See Pet. 25 n.17 (citing ten federal marketing orders in addition to those at issue here that authorize generic promotion programs), 26 n.18 (citing seven federal statutes that authorize such programs), 26 n.19 (citing statutes in seven of the nine States in the Ninth Circuit authorizing such programs); see also Pet. 28-29 nn.21 & 22 (citing nine pending First Amendment challenges to generic promotion programs); *Goetz* v. *Glickman*, No. Civ. A 94-1299-FGT, 1996 WL 138038 (D. Kan. Feb. 28, 1996) (rejecting First Amendment challenge to beef promotion program upheld in *Frame*). As respondents note (Br. in Opp. 14 n.15), bills introduced in Congress after the filing of our petition included provisions that set forth findings on the purpose and effect of generic promotion programs for agricultural commodities. A similar provision is included in a bill that has passed both Houses of Congress but has not yet been signed by the President. See H.R. 2854, 104th Cong., 2d Sess. § 501 (passed Senate Mar. 28, 1996). The enactment of that

Respondents also rely on the Ninth Circuit's determinations that the programs interfere with the ability of handlers to "market their product as they prefer," and that the Secretary should "allow for credits to tree fruit handlers for their own individualized advertising programs." Br. in Opp. 27; Pet. App. 18a, 20a. The court's first determination merely reflects its disagreement with Congress's decision in the AMAA to authorize promotion programs funded by mandatory industry assessments. See 7 U.S.C. 608c(6)(I), 610(b)(2)(ii). The court's other determination ignores that Congress has chosen to authorize credits for the individual advertising of certain commodities, but not those at issue here. See Pet. 27 n.20; 7 U.S.C. 608c(6)(I). By basing its decisions on features of the programs that are rooted in statutory provisions, the Ninth Circuit effectively held those statutory provisions unconstitutional as administered by the Secretary (even though the court also held that the Secretary's administration of those provisions was not arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, Pet. App. 9a-12a). For that reason alone, review by this Court is warranted.

4. Further review is also warranted because the decision below cannot be squared with the Third Circuit's decision in *Frame* upholding the generic promotion program for beef. Pet. 21-25. Respondents' attempts to distinguish *Frame* are unpersuasive.

Respondents assert that *Frame* was based on evidence that "the beef industry [was] on the verge of crumbling." Br. in Opp. 21. The court in *Frame* cited that evidence, however, only to support its determination that the beef

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provision would not diminish the need for further review of the decision below nor, if further review were granted, would it appreciably complicate resolution of the question presented.

program served a sufficiently important governmental interest under the relevant First Amendment principles. 885 F.2d at 1134-1135. The Ninth Circuit similarly determined that the generic advertising programs at issue here serve a sufficiently important governmental purpose to withstand First Amendment review. Pet. App. 16a-17a. Thus, the Ninth Circuit's decision striking down the programs was not based on the factor—the importance of the governmental interest—to which evidence of industry conditions was considered relevant in *Frame*. That evidence therefore does not explain the different results in the two cases.

Respondents observe that the program upheld in *Frame* applied nationwide, whereas the programs at issue here apply only in California. Br. in Opp. 25. Respondents provided no evidence, however, to support their assertion (*ibid.*) that handlers outside of California benefit from the programs.[7] Moreover, the court in *Frame* upheld the beef promotion program despite a similar assertion by the plaintiff in that case that the program benefited beef industry participants in addition to those who funded the program. See 885 F.2d at 1137.

Finally, the limited geographic scope of the programs reflects the statutory requirement that marketing orders under the AMAA be restricted "to the smallest regional

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[7] California produces approximately 90% of all domestically produced nectarines and plums and 50% of all domestically produced peaches. Gov't C.A. Br. 4 (citing administrative record). The prices for California tree fruit are substantially higher than those for tree fruit produced in other States because of California's superior climate. *Id.* at 23 n.23. A principal rationale of the marketing orders for California tree fruit has been to build on that advantage through quality control and advertising. *Ibid.* In these circumstances, it cannot be presumed that handlers of fruit produced outside of California benefit from the programs at issue here.

production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). In agreeing with respondents that the geographic limitation contributes to the unconstitutionality of the programs (Pet. App. 21a), the Ninth Circuit effectively held that statutory provision unconstitutional as applied in the present context. As discussed above, the Ninth Circuit likewise effectively held unconstitutional other AMAA provisions authorizing the programs. See p. 8, *supra*. In light of the importance of these and similar federal and state programs to the Nation's farm economy and the conflicting decisions of the courts of appeals, review by this Court is warranted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996